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April 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 20, 2004

Case No.: TIA-0208

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Worker's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a) (2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as an apprentice carpenter at the Oak Ridge Plant (the plant). He worked at the plant for approximately 1 year, from 1950 to 1951.

The Applicant filed an application with the OWA, requesting physician panel review of his breast and bone cancers. The Applicant claims that his conditions were due to exposures to toxic and hazardous materials during the course of his employment.

In reviewing the Applicant's breast cancer, the Panel cited dust and asbestos exposure at the plant, but concluded that those exposures were not a factor in his breast cancer. The Panel determined that the development of the bony metastases was from the primary breast cancer. Accordingly, the Panel rendered negative determinations on both conditions, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. The Applicant argues that the Panel did not take into account that he may have had additional, undocumented toxic exposures during his employment and in his other activities near the plant. The Applicant also objects to the Panel's statement that chest x-rays that he had in conjunction with a separate illness were a risk factor for his breast cancer; the Applicant states that his physician told him that the x-rays were not a risk factor. See Applicant's Appeal Letter.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

As an initial matter, we note that the Applicant does not challenge the Panel's determination that the bone cancer represented a metastasis of the breast cancer. Accordingly, we turn to the Applicant's objections to the Panel's determination on breast cancer.

The Applicant has not demonstrated Panel error in the breast cancer determination. The Applicant's argument that he may have other unknown exposures does not indicate Panel error. A physician panel bases its determination on the record, and the Panel specifically considered the Applicant's exposure to dust and asbestos. Similarly, the fact that his physician disagrees with the Panel's identification of the Applicant's chest x-rays as a risk factor does not indicate Panel error. The Panel addressed the documented exposures; whether the Applicant's chest x-rays were a risk factor was not part of that analysis.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0208 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 18, 2005